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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1935.

No. 428

IN THE MATTER OF
GRANADA HOTEL CORPORATION,
Debtor.

C. S. TUTTLE, ALBERT J. PETERSON, LEWIS W. RIDDLE, W. G. STURM, AND E. A. KILMER, AS MEMBERS OF A COMMITTEE CONSTITUTED UNDER THE TERMS OF THE DEPOSIT AGREEMENT DATED APRIL 28, 1933, ETC.,
Petitioners,

vs.

SAM HARRIS, J. ROSE AND I. GORDON, PETITIONING CREDITORS,
Respondents.

TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF SUPPORTING PETITION FOR CERTIORARI WITH APPENDIX.

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SUMMARY OF ARGUMENT.

I.

A foreclosure receivership is not a prior equity receivership pending within the meaning of subdivision (a) of section 77B of the bankruptcy act as amended. By "a prior equity receivership pending" is meant a general equity receivership for a corporation and its property as distinguished from a special receivership, such as that in a foreclosure, which relates to specific property, and does not involve the corporation and its affairs generally. This becomes very clear when section (3) of the bankruptcy act, particular reference being had to the 5th act of bankruptcy, is considered in connection with the various pertinent provisions of 77B, and when the authorities are also considered.

Standard Accident Insurance Company v. **Sheftall**, 53 Fed. (2d) 40 at 41, where it was held, in view of the general purposes of the bankruptcy act, that a general receivership is referred to in connection with the 5th act of bankruptcy and not a receivership for specially described property as in a mortgage foreclosure.

State of Texas v. **Porter**, 74 Fed. (2d) 269 at 271, following the Sheftall case.

The Carasaljo Hotel Company, 8 Fed. (2d) 469 at 471, announcing the same principle.

NOTE: Where an opinion is not found except in Commerce Clearing House, Inc., service, our citations, in our list of authorities, are to that service; for example, **In re 2168 Broadway Corporation, CCH. Para. 3448.**

Wiggins v. **Hummel**, 295 Fed. 510-11, where the court passed upon the 5th act of bankruptcy with reference to "a general assignment for the benefit of his creditors", holding that such an assignment must cover all the property of the debtor and not amount to a mere special assignment with respect to part of it.

Clark on Receivers, Vol. 1, 2nd Ed., pages 24 and 25.

Schmidtman v. *Atlantic Phosphate and Oil Corporation*, 230 Fed. 769 at 771.

In re 2168 Broadway Corporation, CCH Para. 3448 (District Court).

In re Draco Realty Corporation, CCH Para. 3492.

Bryan v. *Welch*, 74 Fed. (2d) 964 at 970.

In re 2168 Broadway Corporation, CCH. Par. 3546 (Court of Appeals).

In re Broadway Barclay Corporation—In re Allen, CCH. Par. 3547 (Court of Appeals).

II.

The cardinal rule of statutory construction is that the legislative intent must be deduced from a view of the entire statute and of every material part thereof taken and construed together. That means, in this instance, that section (3) of the bankruptcy act, 5th act of bankruptcy; that part of subdivision (a) of 77B, which is jurisdictional, and which relates to a prior proceeding in bankruptcy or equity receivership pending; that part of subdivision (a) of 77B which provides that the court shall exercise all powers, not inconsistent with 77B, which a federal court would have, had it ap-

pointed a receiver in equity for the property of the debtor; that part of subdivision (a) of 77B relating to the jurisdiction of the bankruptcy court over subsidiary corporations; part (10) of subdivision (b) of 77B relating to priorities as if a receiver in equity of the property of the debtor had been appointed; also that part of (10) of (b) of 77B relating to claims rejected by a receiver in equity or a trustee in bankruptcy; part (2) of (c) of 77B relating to same powers as those exercised by a receiver in equity; subdivision (i) of 77B, which is administrative, not jurisdictional, providing that proceedings under 77B may be had as provided in subdivision (a) even though there be a receiver or trustee for all or any part of the property of the corporation in another court; and subdivision (k) of 77B providing that other provisions of the bankruptcy act shall apply to proceedings under 77B unless inconsistent therewith; will all have to be considered and construed together and as a part of the entire bankruptcy act as amended.

2 Lewis Sutherland on Stat. Const., 2nd Ed. Section 368.

United States v. **Ewing**, 237 U. S. 197 at 200; 59 Law Ed. 913 at 915.

People v. **Continental Illinois Bank**, 360 Ill. 454 at 457.

When all these provisions of the bankruptcy act, together with the authorities cited, are considered, the conclusion that a foreclosure receivership is not "a prior equity receivership pending" within the meaning of 77B is inescapable. When, in subdivision (k), of 77B, congress provided that all other provisions of the bankruptcy act, with certain exceptions, should apply to proceedings under 77B, it adopted the interpreta-

tions theretofore given to such other provisions by the courts and those interpretations are a part of the law. It follows that the definition or the meaning of an equity receivership under the 5th act of bankruptcy is fixed by the cases cited under I of this summary. No different meaning can be used under 77B.

III.

There is an idea which is quite prevalent that acts of congress may be interpreted through an examination of the congressional debates thereon. This is an error. The meaning of an act of congress is to be determined from the language used therein, and not from the debates in congress or through any extrinsic source.

United States v. **Trans-Missouri Freight Association,** 166 U. S. 290; 41 Law Ed. 1007 at 1020.

Duplex Printing Company v. **Deering,** 254 U. S. 474; 65 Law Ed., 349 at 360; 16 A. L. R. 196 at 208.

United States v. **United Shoe Machinery Company,** 234 Fed. 127 at 147 (refusing to consider records of debates in congress in construing Clayton act.)

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TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF SUPPORTING PETITION FOR CERTIORARI.

MAY IT PLEASE THE COURT:

The error of the Court below lies in the holding that a foreclosure receivership, succeeded by a trusteeship (trustee in possession), under orders of a state court, constitutes

a prior equity receivership pending under Section 77B of the Bankruptcy Act, as amended.

The question as to whether "a prior * * * equity receivership is * * *, pending" under Subdivision (a) of Section 77B of the Bankruptcy Act, as amended, is **jurisdictional**, and is, therefore, very important.

The Pertinent Facts.

The creditors' petition in the above cause was filed against the Granada Hotel Corporation, debtor, in the District Court (R. 5) charging that a receiver had been appointed in the state court "of the assets and property of the debtor" (R. 5, Par. VIII) and that the proceedings in that behalf were still pending. The intervening petition of the City National Bank and Trust Company of Chicago (R. 12, 13, Pars. 4, 8) and the answer (R. 15) of appellants (a bondholders' committee) show that there was a foreclosure in the state court on a second mortgage as to the real property described in the mortgage, that first mortgage foreclosure proceedings had been started and were still pending through cross-bill filed in the second mortgage suit, and that, prior to the filing of the petition under 77B, the state court, by appropriate orders, had discharged the receiver and had placed the first mortgage trustee in possession of the property under the terms of the trust deed, as mortgagee or trustee in possession after condition broken. These facts, as set up in the intervening petition and the answer, were established at a hearing held in the District Court (R. 23, *et seq.*). Hence, it was claimed on behalf of the intervenor and the bondholders' committee (the debtor apparently having allowed the matter to go by default) that there was no prior equity receivership pending, as contemplated by 77B, and that the court was without jurisdiction (no act of bankruptcy being otherwise alleged).

The trial court took the view that a foreclosure receivership was a prior equity receivership pending within the meaning of 77B, and that the discharge of the receiver and the placing of the trustee in possession, by orders of court, did not change the status (R. 25, 26 and see opinion R. 54 to 56) and the Court of Appeals for the Seventh Circuit has sustained that view.

The points made in this court by petitioners are the same as those made by them in the court below, namely, (1) that the foreclosure receivership was not a prior equity receivership pending within the meaning of 77B, and (2) that, even if the foreclosure receivership could be construed as a prior equity receivership pending, the new status with the trustee in possession could not be so construed.

So far as we have been able to ascertain, no opinion has been written on the instant question under 77B wherein all of the pertinent parts of the statute have been analyzed, compared and construed together and wherein all the authorities have been cited, though, as will be seen, there are some opinions where this has been done in part, in each of which the holding has been that a foreclosure receivership is not a prior equity receivership pending.

It is apparent, on a moment's reflection, that a foreclosure case, even though there be a receiver, can not be construed as a pending equity receivership for a corporate debtor. There are fundamental reasons for this. A given corporate debtor might own a dozen hotels, as some of them do, and one of the dozen might be encumbered while the others might be clear of encumbrance. The corporation might be amply solvent and abundantly able to pay all its debts and yet there might be a foreclosure proceeding

against the one encumbered hotel and there might be a custodian receivership for that property. Certainly, it couldn't be said under such circumstances that the corporation was in an equity receivership as contemplated by 77B. Furthermore, a receiver appointed in a foreclosure proceeding is really a custodian. He is appointed in accordance with the terms of the mortgage or the trust deed. He does not have title to the property and can not sell it or dispose of it at all. He can only hold possession of it as custodian during the period covered by the foreclosure proceedings. On the other hand, if a corporation is in an equity receivership, distinguishing a corporation from a part or all of its assets, the receiver has all the property and may sell it and dispose of it under orders and decrees of court, and the affairs of the corporation may be wound up in an equity receivership for the corporation, or sometimes there may be an equitable reorganization. A property custodian receivership under a foreclosure and an equity receivership for a corporate debtor are fundamentally different and can not possibly be interpreted as amounting to one and the same thing.

A receivership in a foreclosure proceeding is incidental and not necessary. Many foreclosures are carried through without any receivership at all. On the other hand, the appointment of a receiver, while in a sense incidental, may be necessary as a part of the proceedings where the affairs of a corporation are to be wound up. It does not seem possible that Congress could have had in mind the idea that the mere appointment of a receiver in a foreclosure case would constitute sufficient grounds upon which to throw a debtor into bankruptcy. As we understand an equity receivership, it is one where the affairs of the corporation may be wound up. Under 77B, the affairs of a corporation may be wound up by reorganization or ultimately, if there is no reorganization, by liquidation. If all the affairs of a

corporation are to be readjusted, proceedings under 77B hold out many advantages over equity proceedings, and this must have been the thought that Congress had in mind when it referred to prior equity receiverships.

About the first case on this subject of "prior equity receivership" was that of *Laclede Gas Light Company,* decided on June 26, 1934, by the United States District Court for the Eastern District of Missouri (C. C. H., Par. 3001, apparently not otherwise reported). The court discussed the matter quite fully and held that a receivership under a foreclosure was not a prior receivership within the meaning of 77B.

In the *Flamingo Hotel Company* case, decided in the Northern District of Illinois on August 9, 1934, (C. C. H., 3007) it was held, by inference at least, that a receiver in a foreclosure case constituted a prior equity receivership, but there is no such discussion on the subject as that found in the Missouri case.

In the *Surf Building Corporation* case, decided in the Northern District of Illinois on October 17, 1934, (C. C. H., 3076) the court apparently proceeded on the theory that a foreclosure receivership constituted a prior equity receivership. Near the end of the opinion in this *Surf Building Corporation* case, the court comments upon the subject of foreclosure receiverships and prior equity receiverships. The court states that a receivership in equity is always incidental to some other ultimate purpose and that equity jurisprudence recognizes no such proceedings as one which asks a receivership as the only relief and then goes on to say that receivers are always appointed in subordination of and incidental to the main purpose of the litigation. And that is all the court has to say on the subject. The court did not go far enough. In a proceeding for the dissolution and the winding up of the affairs of a corporation,

it is essential that a receiver shall be appointed who shall take possession of the property of the corporation and administer it and dispose of it in accordance with the rights of the parties as fixed by the orders and decrees of court.

It has been suggested that section 3a of the Bankruptcy Act is helpful in determining what is meant by a prior equity receivership. Section 3a defines acts of bankruptcy, and the 5th act of bankruptcy as there defined is as follows:

> Or (5) made a general assignment for the benefit of his creditors; or while insolvent, a receiver or a trustee has been appointed, or put in charge of his property.

As we read the foregoing language, the meaning is that an act of bankruptcy has been committed when the debtor, being insolvent, has had a receiver or a trustee put in charge of his property. That would seem to be an equity receivership as distinguished from a contractual custodian receivership under foreclosure proceedings. There might be receivership proceedings without a receiver, but there couldn't be a receivership without a receiver.

Subdivision (i) of 77B provides that "if a receiver or trustee of all or any part of the property of a corporation has been appointed by a federal, state or territorial court, whether before or after this amendatory act takes effect, a petition or answer may be filed under this section at any time thereafter by the corporation, or its creditors, as provided in subdivision (a) of this section."

In the language which we quoted from subdivision (i), it is to be noted that the provision is that "a petition or answer may be filed under this section at any time thereafter by the corporation, or its creditors as provided in subdivision (a) of this section."

In other words the meaning and intent are that a peti-

tion or an answer may be filed even if the facts exist as described in (i) but the filing must be "as provided in subdivision (a) of this section." **Subdivision (i) is wholly administrative, and not jurisdictional, as hereinafter pointed out more fully.**

Turning to subdivision (a), we come back to the point of beginning and the language is as follows: "If a prior * * * equity receivership is not pending." Manifestly, it was not the intent of the Congress that "a prior equity receivership" should have two or more meanings in the same act.

Hence, we say it follows that the reasoning of the court in the *Laclede Gas Light Company* case, C. C. H., Par. 3001, is correct.

In the case of *Bryan* v. *Welch,* 74 Fed. (2d) 964, decided by the United States circuit court of appeals for the tenth circuit on January 7, 1935, the court gave consideration to this subject of a prior equity receivership, or an equity receivership. In that case the alleged debtor was the Royalties Company, a common law trust, and the trust was treated and considered as a corporation. Treating the trust as a corporation was proper under the sixth subdivision of the first section of the bankruptcy act where it is stated that corporations shall include unincorporated companies and associations and any business conducted by a trustee or trustees wherein beneficial interest or ownership is evidenced by certificate or other written instrument (see page 9 of Gilbert's Collier on Bankruptcy, Third Edition).

In this case of *Bryan* v. *Welch,* there was an original involuntary petition and there were also some intervening petitions. The petitions in that case did not allege an act of bankruptcy within four months but each of them alleged the pendency of a prior state court receivership. The

grounds alleged in the state court for the appointment of a receiver were mismanagement, waste and dissipation of assets, and fraud on the part of the trustees of the Royalties Company, the common law trust. A receiver had been appointed and the order appointing the receiver authorized the receiver to take possession of all of the assets, and the books and records of the Royalties Company, and to enforce and prosecute claims in its favor, collect moneys due it, and to defend claims and suits against it, and generally to manage, preserve and protect its assets and business.

The court of appeals cited a number of decisions by state courts to the effect that a court of equity, by virtue of its general equitable jurisdiction, at a suit of a stockholder on the ground of fraud, mismanagement, waste and dissipation of assets by the corporate officers, might appoint a receiver for the corporation, to protect and preserve its assets and to continue its business, and, thereafter, when there had been a change of corporate officers or it appeared to be prudent to do so, might restore its property and affairs to its duly constituted corporate authorities. The court then went on to say that if the Royalties Company was to be considered as a corporate entity, the receivership would be an equity receivership, and then the court said: "We conclude that the state court receivership was an equity receivership within the meaning of section 77B."

That opinion, in some respects, coincides with our view of what is meant by a prior equity receivership as that language is used in 77B, and that is a very different situation from that which we have here.

In the instant case, there is no receiver for the debtor. No receiver has been appointed to take possession of all of its assets and of its books and records and no receiver has been appointed to enforce and prosecute claims in

its favor, or collect moneys due it, or to defend claims and suits against it, or to generally manage, preserve and protect its assets and its business. On the contrary, there was only a contractual custodian receivership under the terms of trust deeds on the basis of which foreclosures are sought (then a trustee in possession). The receiver under these trust deeds and in these foreclosure proceedings, and later the trustee in possession, did not have any right to take possession of the assets of the debtor generally; did not have any right to the books and records of the corporation; did not have any right to enforce and prosecute claims in its favor; did not have any right to collect moneys due it; did not have any right generally to manage, preserve and protect its assets and business.

If an effort were to be made to have a receiver appointed for a corporation in a court of equity for the purpose of taking charge of its affiairs generally on the ground that its properties were in a foreclosure receivership, that effort would be ridiculous and would necessarily fail. The law does not recognize any such ground for an equity receivership for a corporation, and never did; and, so far as we know, the law of no state recognizes any such ground. To appoint a receiver under such circumstances would be to deprive the corporation of the right to defend foreclosure suits. For many years, there have been statutory grounds in the different states for the appointment of receivers for corporations—equity receivers—and there are many cases holding that receivers can be appointed only upon such statutory grounds.

It is evident that the debtor in the instant cause was not in a prior equity receivership. This is true whether the prior proceedings were in a state court or a federal court. A foreclosure proceeding in a federal court wouldn't be any different in this regard from a foreclosure proceeding in a state court. Even if there were a prior equity re-

ceivership in a federal court, that court could not, as a pure court of equity, afford to the parties in interest the advantages of 77B, and that is the reason why it doesn't make any difference whether the prior equity receivership, *if there is one,* is in a state or a federal court.

It is to be noted that the language of 77B—"if a prior proceeding in bankruptcy or equity receivership is not pending"—links two similar things together and places them in apposition to each other, and perhaps it can be said that one may shed light on the other. If there were a *proceeding* in bankruptcy or an equity receivership pending, assuming that in either event proceedings were being carried along, it would mean that there was a trustee in the one case or a receiver in the other, holding all the property of the debtor and by whom or through whom, under proper orders of court, the assets of the debtor could be disposed of for the benefit of creditors; the thought or purpose contained in 77B evidently being that if the affairs of the debtor were about to be wound up by proceedings in ordinary bankruptcy or by an equity receivership, then, and in either of such events, resort could be had to the provisions of 77B. Within the meaning of this language, as found in 77B, it could hardly be said that the mere filing of an involuntary petition in bankruptcy or the mere filing of a bill or a complaint for an equity receivership could constitute "a prior proceeding in bankruptcy or equity receivership" pending. If there is no prior proceeding in bankruptcy or equity receivership pending, then there must be an allegation as to an act of bankruptcy committed within four months, as defined in the act as it stood prior to the recent amendments.

The district court, in deciding this *Granada Hotel Corporation* case, (9 Fed. Supp. 909) used the following language:

"The court is not impressed with the contention that

the facts related do not constitute an equity receivership, essential to jurisdiction of this court. As is frequently observed, a receiver is a fiduciary of the court, appointed as an incident to other proceedings wherein certain ultimate relief is prayed. The trustee here, likewise, is a fiduciary of the state court, and is acting under the orders, directions and control of that court. Words of themselves are unimportant. Whether the trustee be called a receiver, a guardian, a custodian, or by some other name, it remains, in its essence, a fiduciary in possession of property pending the outcome of foreclosure, holding under the court's order, incidentally to the ultimate purpose of the state proceedings. Consequently there is an equity receivership within the meaning of that term as used by congress."

It seems to us that the district court failed, for one thing, to distinguish between contractual actions *in rem* and personal actions. A foreclosure is an action wherein an alternative decree is entered. If a certain amount of money is not paid by a given date, there will be a sale of the property. If the property sells for enough to satisfy the debt, that ends the matter and the action is wound up as one *in rem*. If the property does not sell for enough to satisfy the debt, there may be a personal deficiency decree against the mortgagor, if the contract calls for it, and in the event of that alternative, there is a personal decree. A receivership under a foreclosure is one that relates to and arises out of a contract, the trust deed or the mortgage, and the property in the receivership, which is really a custodianship, there being no title in the receiver, is to be handled and disposed of in accordance with the contract, and not otherwise. On the other hand, a suit for an equity receivership is one where it is sought to have a receiver appointed for the purpose of taking charge of the affairs of the debtor to the exclusion of the debtor. In an equity receivership, there is a receiver of the debtor corporation, personally, and of all of its property. The language used

in the case of *Bryan* v. *Welch*, 75 Fed. (2d) 964, *supra*, "that Bryan be appointed receiver of the Royalties Company and of all its property, real, personal and mixed of every kind whatsoever, with full power to demand, sue for, collect, receive and take into his possession and preserve its goods, property, assets and choses in action, to take possession of its books and records, and to prosecute and defend all claims for or against it," is the language often used in creating an equity receivership. Such an action is primarily of a personal nature, taking in incidentally all of the property of the debtor with full power over it and complete control of the title. On the other hand a foreclosure receivership, or custodianship, may relate to only a small portion of the debtor's property and may be wholly a *rem* action. When we levy on property under judgments at law, or when we attach property in actions at law, or when we take property on replevin, custodians are often appointed, but they are mere custodians, having no title, but merely preserving the status of the property temporarily, and it seems to us that no stretch of the imagination could construe such a custodianship as an equity receivership. Such reasoning would lead to all sorts of absurd conclusions.

Congress must have meant and intended something definote in the use of the following language:

> "Three or more creditors who have provable claims against any corporation which amount in the aggregate, in excess of the value of securities held by them, if any, to $1,000 or over, may, if such corporation has not filed a petition or answer under this section, file with the court in which such corporation might file a petition under this section, a petition stating that such corporation is insolvent or unable to meet its debts as they mature, and, if a prior proceeding in bankruptcy or equity receivership is not pending, that it has committed an act of bankruptcy within four months" etc.

If there were a prior proceeding in bankruptcy pending, it would be against the corporation personally. There couldn't be a bankruptcy proceeding without a bankrupt. A bankruptcy proceeding may be both personal and *in rem* but it must be personal. Sometimes there is no property—no *rem*. We think this is helpful in the matter of determining what is meant by a prior equity receivership. It seems to us to be obvious that Congress meant a receivership for the corporation just the same as it meant bankruptcy for the corporation—not a mere custodianship for the property of the corporation or a part of it. And we repeat that this language must have and must be so interpreted as to have a definite meaning. It can't mean one thing in one case and something else in another case as that would tend to endless confusion.

There is another thought in connection with the interpretation of this language,—"if a prior proceeding in bankruptcy or equity receivership is not pending",—which must not be overlooked. The reference to an *equity* receivership and meaning must be given to the word "equity". The act does not refer to a mere receivership. The word "receivership" is very broadly used both in law and in equity. There may be law receiverships, contractual receiverships, so called, and other receiverships, depending upon the codes and the practice in different states. We are dealing with a law which relates to the whole United States and every state thereof and the words "equity receivership" must be given a meaning which will be good in every state. The language used by the District Court in its opinion would cover almost any sort of custodianship or receivership whether equitable or otherwise. The court makes the two words, "equity receivership", cover a receiver, whether in law or in equity, a guardian, a custodian, or any other name, where the appointment is by the court. Obviously, that is not what is meant by the language with which we are

dealing. Even in Illinois, there may be a receiver appointed by a court of record in a garnishment or an attachment suit. Under section 24 of chapter 62 of Smith-Hurd Illinois Revised Statutes of 1933, relating to garnishment, there is a provision that if the garnishment proceeding be in a court of record, the court may appoint a receiver to take possession, collect or otherwise dispose of any goods, chattels, choses in action or effects, belonging to the defendant, and make all orders in regard thereto which may be necessary or equitable between the parties; meaning that the court has power to appoint a receiver for the goods and chattels reached by the garnishment for the benefit of the parties to the suit. In the same way, if a so called foreclosure receivership is for the benefit of some one or more parties to the suit and is not for the benefit of all creditors or of other parties generally; whereas, an *equity* receivership for a corporation is one where the court, through its receiver, takes possession of the corporate debtor and of all of its property, for the purpose of protecting the rights not only of the parties to the suit but also for the purpose of protecting the rights of all parties in interest, just as a bankruptcy proceeding is carried on for the benefit of all who may be interested. Certainly it could not be said that it would be an act of bankruptcy under 77B if some state court should appoint a trustee, or a receiver, or a guardian, or a custodian, or an official by some other name, for the purpose of disposing of property, specifically mentioned, in an attachment suit, or a garnishment suit, or a replevin suit, or any other suit in a state court for the purpose of handling such property for the benefit of those who might have contractual or statutory rights therein.

The language which we are considering makes an equity receivership in effect a new act of bankruptcy for purposes of 77B and then goes on to say that if there is no prior pro-

ceeding in bankruptcy or equity receivership pending that the debtor must have committed an act of bankruptcy within four months, obviously referring to other acts of bankruptcy as described in the bankruptcy act.

In the laws and the codes of the various states of the union there are numerous provisions for the appointment of guardians, custodians, receivers and other like officials where the purpose is to take care of the rights of the parties who are interested in the particular suit in which such action may be taken. In Illinois, a corporation might have some of its property reached by attachment or garnishment and in such a case a court of record could appoint a receiver. Would anybody contend that such a "receivership" was an equity receivership? The answer is obviously in the negative.

Section 77B is new and is more or less involved. Interpretations of its provisions are unsettled, and it is quite apparent that many of its provisions have not been thoroughly considered and fully understood by those who have dealt with them. We feel sure that the meaning of a "prior equity receivership" will ultimately be determined to be some such a receivership as is described in *Bryan* v. *Welch*, 74 Fed. (2d) 964, *supra*.

Another Suggestion on Equity Receiverships.

Where there is an attachment receivership or a foreclosure receivership or other receivership relating to specific property of a corporation under contractual or special statutory claims, the jurisdiction of the court does not cover the affairs of the corporation generally but touches the corporation only for the purpose of making disposition of the particular property involved. If a court, in an attachment suit or a foreclosure suit, were to undertake to appoint a receiver for a debtor corporation generally, any

order entered in that behalf would be void because the court would have no jurisdiction to enter it. It necessarily follows that such limited receiverships are not equity receiverships within the meaning of 77B. The language of 77B is that "if a prior proceeding in bankruptcy or equity receivership is not pending." A prior proceeding in bankruptcy would necessarily be a liquidating proceeding, and these words as to a prior proceeding in bankruptcy being immediately followed by "or equity receivership," it would necessarily seem to follow that the words "equity receivership" were intended to mean a liquidating proceeding. It seems to us to be impossible to escape this conclusion. Furthermore, 77B is specifically designed "for the relief of debtors." In other words, the section is a debtor section and not a creditor section. Equity receiverships are often for the benefit of the debtor. Section 77B enlarges those benefits and that is one of the principal reasons for its enactment.

In *Smith, Receiver* v. *McCullough*, 104 U. S. 25 at 28-9; 26 Law Ed. 637 at 639; the court held that a receiver in a foreclosure action is not a receiver of any property except that covered by the mortgage.

In *Central Trust Company of New York* v. *Worcester Cycle Mfg. Co.*, 114 Fed. 659 at 662 and 663 and other pages there is a discussion of the distinction between general receiverships and special receiverships, and the court held that an order appointing a receiver in a suit to foreclose a mortgage, although broad in its terms, and purporting to extend to all of the property of the mortgagor, should not be construed to cover property not included in the mortgage. The receiver, the court stated, "was not constituted either a statutory or equitable general receiver of the corporation, but merely a custodian of the mortgaged property."

In *Scott* v. *Farmers' Loan and Trust Company,* 69 Fed. 17 at 20, it was held that "the jurisdiction possessed by a court of chancery to foreclose a mortgage and to appoint a receiver for the mortgaged property, pending the foreclosure, gives it no jurisdiction or power to seize or take into its custody or control, through a receiver or otherwise, property of the debtor which is not covered by the mortgage." The further holding was that the court could make no order with respect to any property other than that described in the mortgage.

In the case of *In Re Richardson's Estate,* 294 Fed. 349 at 357, the court held, citing numerous authorities, that "a court can not appoint a receiver to take charge of property which is not involved in the litigation, or to take charge of all of a debtor's property, including that which is not, as well as that which is, specially bound for the payment of the claim in suit."

From the foregoing, it must be entirely clear, on principle, that a foreclosure receivership is special, being confined to the particular property under foreclosure, and that it is entirely different from a general equity receivership for a corporation and its property such as is obviously contemplated by 77B.

We come now to the further consideration of the various statutory provisions involved and to the citation of authorities, defining equity receiverships within the meaning of the bankruptcy act, which, to our mind, are conclusive to the effect that a foreclosure receivership is not a prior equity receivership pending as contemplated under 77B.

Meaning of Prior Equity Receivership Pending.

Bearing in mind the rule of statutory construction, we shall give special consideration to the following parts of the bankruptcy act as amended:

(1) Section (3) of the act, defining acts of bankruptcy, especially the 5th act of bankruptcy, which makes it an act of bankruptcy if, while a person is insolvent, a receiver or a trustee has been appointed or put in charge of his property.

(2) Subdivision (a) of 77B, particularly that portion relating to a prior proceeding in bankruptcy or equity receivership.

(3) Subdivision (a) of 77B providing that the bankruptcy court may exercise all powers, not inconsistent with 77B, which a federal court would have, had it appointed a receiver in equity of the property of the debtor.

(4) Subdivision (a) of 77B as relating to the jurisdiction of the bankruptcy court of subsidiary corporations.

(5) Part of (10) of subdivision (b) of 77B as relating to priorities of unsecured claims over existing mortgages as if a receiver in equity of the property of the debtor had been appointed by a federal court.

(6) Also in (10) of (b) of 77B, as relating to claims rejected by a trustee or receiver in bankruptcy or a receiver in equity.

(7) In (2) of (c) of 77B, that part relating to what the court shall have power to do, reference being made to "the same powers as those exercised by a receiver in equity," etc.

(8) Subdivision (i) of 77B, which is administrative, not jurisdictional, and which provides that proceedings under 77B may be had as provided in subdivision (a) even though there be a receiver or trustee for all or any part of the property of the corporation in another court.

(9) Subdivision (k) of 77B providing that "all other provisions of this act" (meaning the bankruptcy act) "except such as are inconsistent with the provisions of this section 77B, shall apply to proceedings instituted under this section," etc.

Subdivision (k) of 77B provides that "all other provisions of this act" (meaning the bankruptcy act) "except such as are inconsistent with the provisions of this section 77B, shall apply to proceedings instituted under this section, whether or not an order to liquidate the estate has been entered. For the purposes of such application, provisions relating to 'bankrupts' shall be deemed to relate also to 'debtors'. 'Bankruptcy proceedings' or 'proceedings in bankruptcy' shall be deemed to include proceedings under this section; the date of the order approving the petition or answer under this section shall be taken to be the date of adjudication and such order shall have the same consequences and effect as an order of adjudication."

Section three of the bankruptcy act defines acts of bankruptcy. The fifth act of bankruptcy is defined as follows: "or made a general assignment for the benefit of his creditors; or while insolvent, a receiver or a trustee has been appointed, or put in charge of his property."

In *Standard Accident Insurance Company* v. *Sheftall,* 53 Fed. (2d) 40, decided by the United States circuit court of appeals for the 5th circuit on October 28, 1931, this question of the meaning of a receivership, as defined in the fifth act of bankruptcy, was before the court. The court held that the receivership contemplated by the act was a general equity receivership and not a special receivership. The court said:

> In view of the general purposes of the bankruptcy act, we understand a general receivership to be referred to, and not one for specially described property, as in a mortgage foreclosure or an effort to enforce some other lien against specific property. The complainant in the bill under discussion did not seek to sequester in equity described property only, but sought for and obtained a general receivership for all the property of the construction company wherever situated, thus withdrawing it from the claims of all common creditors except by intervention in the receiver.

> ship. We have no doubt that this is such a receivership as was contemplated by the above-quoted words of the statute. The fact that the judgment lien extends to all the property, and will not be invalidated by a bankruptcy, does not prevent an adjudication.

In that case there had been a receiver appointed to take charge of the affairs of the corporation generally.

This case has been followed by the same court in *State of Texas* v. *Porter,* 74 Fed. (2d) 269, decided on January 11, 1935.

The same principle is announced in *The Carasaljo Hotel Company* case, 8 Fed. (2d) 469, decided by the court of appeals for the 3rd circuit.

The fifth act of bankruptcy as above quoted covers "a general assignment for the benefit" of creditors.

Such an asignment must cover all the property of the debtor and not amount to a mere special assignment or special agreement with respect to part of the property (*Wiggins* v. *Hummel,* 295 Fed. 510 at 511).

There are many different kinds of receivers. There are receivers appointed out of court by public officials and there are receivers appointed by courts. There are receivers *pendente lite* and receivers after judgment; common law receivers and statutory receivers; provisional receivers and ancillary receivers; temporary or interim receivers; permanent receivers, special receivers, general receivers, sequestration receivers, foreclosure receivers, operating receivers, administration receivers, active and passive receivers and others.

In Clark on Receivers, volume 1, second edition, at page 24, under the subject of "Special Receiver," the author says:

> By a special receiver is generally meant a receiver appointed in a suit to foreclose a mortgage on a particular parcel of property. Generally to conserve the

mortgaged property the decree of foreclosure affects only the property foreclosed and not all the property of the defendant. Such a suit is not for the purpose of making an equitable distribution of all the assets of the defendant among all of his creditors. The purpose of the receivership is to conserve the mortgaged property while the suit is in progress.

The same author, in the same volume, at page 25, under the heading of "General Receiver," says the following:

> The term general receiver is usually applied to a receiver who takes custody of all the property of an individual or corporation for the purpose not only of preserving it and making it available to satisfy any judgment of the plaintiff in the case, but also that the assets and property of the defendant may be collected, administered and distributed to all claimants who may present their claims to the receiver. General receivers are of a permanent character, and in the case of a corporation the purpose and object of their appointment is not only to adjust and pay the claims of creditors but also to distribute the surplus to stockholders.

In the case of *Schmidtman* v. *Atlantic Phosphate and Oil Corporation,* 230 Fed. 769 at 770-1-2, decided in 1916 by the United States circuit court of appeals for the second circuit, there was a question before the court which involved the distinction between special receivers and general receivers. The Phosphate Corporation was organized under the laws of New York. Its real estate was mortgaged for a large sum of money. A general creditor filed a bill against it alleging insolvency and receivers were appointed. Claims of creditors were advertised for, filed and proved. Then a suit was started to foreclose on the real estate and the appointment of a receiver was demanded in that case. The two cases were consolidated and the receivership was extended so as to include both. The mortgaged property was sold and the question arose as to whether debts due to laborers could be paid out of the proceeds arising from the foreclosure sale before distribution

on the bonds and coupons secured by the mortgage, there being a statute in the state of New York providing that upon the appointment of a receiver for a corporation the wages of employees should be preferred. The trial court decided in favor of paying the wages as preferred claims. The court of appeals reversed the trial court. The court of appeals stated that there was no satisfactory state court construction of the statute and that for that reason the circuit court of appeals was forced to construe the act. The circuit court of appeals held that the words "upon the appointment of a receiver of a corporation," as found in the statute, must mean the appointment of a receiver of the whole property of the corporation. The court further stated: "Certainly the section was not intended to apply where the foreclosure of a mortgage on a single parcel of real estate, owned by a corporation, brought about the appointment of a receiver in mortgage foreclosure. In the case at bar, general receivers were first appointed. The mere circumstance that when foreclosure proceedings were instituted the same persons were appointed receivers therein makes no difference."

Another thought: If foreclosure proceedings in the state court were to be carried to a conclusion and a given amount were found to be due, the defendant could pay that amount and have the receiver discharged and the foreclosure suit dismissed. If a general equity receiver had been appointed for the debtor, on the complaint of some creditor, and an equity receivership were pending, the defendant couldn't go into court and pay any amount found to be due to the complainant and thereby cause the receiver to be discharged and the suit to be dismissed. A foreclosure proceeding is a special proceeding *in rem*, as we have heretofore pointed out, and the jurisdiction of the court is confined to the terms of the trust deed. The receivership in such a case is special. A foreclosure proceeding is not a

class suit. On the other hand, an equity receivership is a class suit just as a bankruptcy proceeding is a class suit, and the defendant in such a class suit can not defeat the suit and the receivership by a settlement with the complaining party or parties. A special receivership under a foreclosure is for the benefit of the parties to the contract. An equity receivership involves the corporation itself and is for the benefit of all of the parties in interest in its affairs.

In a special receivership, such as a foreclosure, carried on under the terms of a contract and for the benefit of the parties in interest therein, creditors of a defendant corporation are not entitled to file general claims and, as a rule, are not interested in the proceedings. On the other hand, where a corporation is in an equity receivership, all of its property is involved, and all creditors, and even stockholders, are interested, and all are entitled to be heard and may assert their rights under such claims as they may have. On reason, the conclusion seems to be inevitable that by using the phrase, a prior equity receivership pending, Congress is bound to have had in mind a general equity receivership involving both the corporation and all of its assets. In such a proceeding, those who have special claims are always allowed to assert them.

The subject we are dealing with here is the interpretation of the language of the act, and it must be conceded that that interpretation must arise out of the act itself and that the language in question can not have one meaning in one case and another meaning in another.

There are so many reasons and so many authorities for the interpretation of "a prior equity receivership" in accordance with our contentions, that the task of enumerating all of them is almost, if not quite, impossible. The bankruptcy act itself, and particularly section 77B, seems to

carry that interpretation all the way through. In subdivision (a) of 77B, we find this further language which seems to have a direct bearing on the point, namely:

> If the petition or answer is so approved, an order of adjudication in bankruptcy shall not be entered and the court in which such order approving the petition or answer is entered shall, during the pendency of the proceedings under this section, have exclusive jurisdiction of the debtor and its property wherever located for the purposes of this section, and shall have and may exercise all the powers, not inconsistent with this section, which a federal court would have, had it appointed a receiver in equity of the property of the debtor by reason of its inability to pay its debts as they mature.

The above language describes the kind of exclusive jurisdiction that the court shall have under 77B on the approval of the petition or answer under the provisions of the bankruptcy act, and that jurisdiction is as full and as complete as a general equity receivership over all of the property of the debtor. If there were a prior equity receivership pending, meaning a general equity receivership with jurisdiction over all of the debtor's property, it would be foolish to give the bankruptcy court, under 77B, any less jurisdiction than a court of equity would have in a general receivership. This not only helps to explain what is meant by a prior equity receivership, but, to our mind, it excludes the possibility of giving the phrase any other meaning than that of a general equity receivership over the entire property of the debtor.

Taking the language which we have just quoted, as describing the exclusive jurisdiction of the bankruptcy court under 77B, how would it sound and how would it seem if we were to change the language to read as follows: —"shall have and may exercise all the powers, not inconsistent with this section, which a federal court would have, had it appointed a receiver in a foreclosure case for a portion of

the property of the debtor". Such a substitution of language would make the jurisdiction under 77B a restricted one and would be utterly ridiculous. It would nullify the jurisdiction of the bankruptcy court, because a receivership in a foreclosure proceeding is restricted to certain property and is contractual. To restrict the jurisdiction of the bankruptcy court in any such manner would be to destroy its usefulness. It necessarily follows that the phrase, "if a prior equity receivership is not pending", which comes later in 77B than the language upon which we have just commented, means a general equity receivership wherein the court has jurisdiction over the corporation and all of its property for the purpose of protecting the rights of all parties in interest, and not for the purpose of enforcing specific contractual liens.

In subdivision (a) of 77B there is a provision for taking charge of the affairs of a subsidiary corporation when certain facts exist and when such subsidiary corporation has filed a petition or an answer in the same proceeding in which the holding corporation is involved, the final language of the provision being as follows: "and thereupon such court, if it approves such petition, shall have the same jurisdiction with respect to such corporation, its property and its creditors and stockholders as the court has with respect to such other debtor", such other debtor being the parent or holding corporation. The meaning of this language evidently is that the bankruptcy court, under 77B, shall have full general equity jurisdiction over the subsidiary corporation, the same as over the parent corporation, with the added advantages of the bankruptcy act. No other possible meaning can be got out of the language, and it is our contention that this is helpful in determining what is meant by a prior equity receivership pending.

In (10) of (b) of 77B, we find this provision:

For all purposes of this section, unsecured claims

> which would have been entitled to priority over existing mortgages if a receiver in equity of the property of the debtor had been appointed by a federal court on the day of the approval of the petition or answer under this section, shall be entitled to such priority, and the holders of such claims, and other claims, if any, of equal rank, shall be treated as a separate class of creditors.

In the above language, just quoted, what is the meaning of the phrase—"if a receiver in equity of the property of the debtor had been appointed by a federal court on the day of the approval of the petition or answer under this section"? Obviously, the reference is not to a foreclosure proceeding or any other proceeding where there might be a special contractual receivership. The provision, as made in the above quotation, is for the purpose of taking care of unsecured claims which might be entitled to priority over existing mortgages. In a foreclosure proceeding, creditors generally are not allowed to file claims, even though there be a receivership, but in a general equity receivership for a corporation and its property, creditors are allowed to file claims, and such claims may be classified according to priorities. It necessarily follows that the reference is to a general equity receivership.

Also in (10) of (b) of 77B we find the following:

> In case an executory contract or unexpired lease of real estate shall be rejected pursuant to the direction of the judge given in a proceeding instituted under this section or shall have been rejected by a trustee or a receiver in bankruptcy or a receiver in equity, in a proceeding pending prior to the institution of a proceeding under this section, any person injured by such rejection shall, for all purposes of this section and of the reorganization plan, its acceptance and confirmation, be deemed to be a creditor.

The question arises as to what is meant by "receiver in equity", as used in the above language. The very obvious answer is that a general receiver in equity having charge of the debtor and its property is meant. No other meaning

is possible. It would be foolish to claim that a foreclosure receiver was meant, because the jurisdiction of the court, even though a court of equity, in a foreclosure proceeding, is limited to the contractual rights of the parties, and general creditors, whether holding claims under leases or otherwise, would not have any right to be heard.

If, in each of these instances, as above referred to, we were to substitute "receiver in foreclosure" or some such language, instead of the language contained in 77B, the absurdity of the whole contention that a foreclosure receivership is the equivalent of an equity receivership would at once be apparent. Yet, if a foreclosure receivership is an equity receivership, as contended for by some, such a substitution would be legitimate. The point is really a simple matter when understood and rightly considered. A foreclosure receivership is special and limited and in such a receivership the court does not have jurisdiction generally over the debtor or over its stockholders or over its creditors and can touch no property except that which is involved under the contract. In a general equity receivership, on the other hand, the court has jurisdiction over the debtor and over its property and claims of creditors and all parties in interest.

In (2) of (c) of 77B, we find the following with reference to what the court shall have power to do upon the approval of the petition or answer, in addition to the jurisdiction and powers elsewhere conferred by the section, as follows:

> Shall fix the amount of the bond of every such trustee, and every such trustee, upon filing such bond, shall have all the title and shall exercise subject to the control of the judge and consistently with the provisions of this section, all the powers of a trustee appointed pursuant to section 44 of this act, and, if authorized by the judge, the same powers as those exercised by a receiver in equity to the extent consistent with this section, etc.

How foolish the above language would become if we were to substitute for "the same powers as those exercised by a receiver in equity" the following: "the same powers as those exercised by a receiver in a foreclosure proceeding"!

Interpretation of Statutory Language.

The meaning of an act of Congress is to be determined from the language used therein, and not from the debates in Congress or from any extrinsic source.

In *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290; 41 Law Ed. 1007, at 1020, in an opinion by Mr. Justice Peckham, where the act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies", was under consideration, the court said:

> Looking simply at the history of the bill from the time it was introduced in the senate until it was finally passed, it would be impossible to say what were the views of a majority of the members of each house in relation to the meaning of the act. It cannot be said that a majority of both houses did not agree with Senator Hoar in his views as to the construction to be given to the act as it passed the senate. All that can be determined from the debates and reports is that various members had various views, and we are left to determine the meaning of this act as we determine the meaning of other acts from the language used therein.
>
> There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. *United States* v. *Union P. R. Co.,* 91 U. S. 72, 79 (23: 224, 228); *Aldridge* v. *Williams,* 44 U. S. 3 How. 9-24 (11: 469-475), Taney, Ch. J.; *Mitchell* v. *Great Works Milling & Mfg. Co.,* 2 Story, 648, 653; *Reg.* v. *Hartford College,* L. R. 3 A. B. Div. 693, 707.
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> The reason is that it is impossible to determine with certainty what construction was put upon an act by

> the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed.

The rule announced in the above opinion has been followed in many subsequent cases, among them being:

Duplex Printing Company v. *Deering,* 254 U. S. 474; 65 Law Ed. 360; 16 A. L. R. 196.

United States v. *St. Paul M. and M. R. Co.,* 247 U. S. 318, 62 Law Ed. 1134.

Cassarello v. *United States,* 271 Fed. 489.

United States v. *United Shoe Machinery Co.,* 264 Fed. 138 at 175.

In re *Kligerman,* 253 Fed. 781.

B. & O. R. Co. v. *Western Union T. Co.,* 241 Fed. 170.

United States v. *United Shoe Machinery Co.,* 234 Fed. 146 (refusing to consider records of debates in Congress in construing Clayton act).

It is no doubt true that resort may be had to the history of the times when an act was passed with the purpose in mind of getting at its general intent. In the instant controversy, no such resort is necessary for the reason that sections 77A and 77B carry their own excuse for existence in that behalf because the additional jurisdiction conferred by 77A, according to the very language of the act, is "for the relief of debtors, as provided in section 77B," and that means corporate debtors. If every sort of special receivership, custodianship, or guardianship, where the court has a special jurisdiction as to certain property, is to be construed as a prior equity receivership pending, then the purpose of 77A and 77B may be changed, through inter-

pretation, from that of relieving corporate debtors in distress to that of harassing them.

Further Consideration of Subdivision (i) of 77B as Bearing Upon the Meaning of "A Prior Receivership Pending".

We wish now to give some further consideration to subdivision (i) as being very helpful in determining what is meant by "a prior equity receivership pending" as used in subdivision (a). Subdivision (i) is in part as follows:

> If a receiver or trustee of all or any part of the property of a corporation has been appointed by a federal, state or territorial court, whether before or after this amendatory act takes effect, a petition or answer may be filed under this section at any time thereafter by the corporation, or its creditors as provided in subdivision (a) of this section, and if such petition or answer is approved the trustee or trustees appointed under this section, or the debtor, if no trustee is appointed, shall be entitled forthwith to possession of and vested with title to such property, and the judge shall make such orders as he may deem equitable for the protection of obligations incurred by the receiver or prior trustee and for the payment of such reasonable administrative expenses and allowances in the prior proceeding as may be fixed by the court appointing said receiver or prior trustee. If a receiver or trustee has been appointed by a federal or state or territorial court prior to the institution of a proceeding under this section, and such proceeding shall be dismissed under subdivision (c), clause (8) of this section, the judge may include in the order of dismissal appropriate orders directing the trustee or trustees, or the debtor if no trustee is appointed, to transfer possession of the debtor's property within the territorial jurisdiction of such court to the receiver or prior trustee so appointed, upon such terms as the judge may deem equitable for the protection of obligations incurred by any trustee or trustees appointed under this section, and for the payment of administrative expenses and allowances in the proceeding hereunder.

As we view this language in subdivision (i), read in connection with other parts of 77B, to which we have called attention, it seems to preclude the possibility of any interpretation being given to "a prior equity receivership pending" other than that of a general equity receivership involving not only the debtor but all of its property also.

It is to be noted that the opening language of subdivision (i) is that "if a receiver or trustee of all or any part of the property of a corporation has been appointed by federal, state or territorial court" etc., and that in that language the use of the phrase, "a prior equity receivership pending", is avoided. The language of subdivision (i) is, and the meaning is, that if a receiver or trustee has been appointed for all or any part of the *property of a corporation,* then and under those circumstances proceedings under 77B may nevertheless be had, as provided in subdivision (a), and such property, whether all or part, of the corporation in a prior receivership or trusteeship shall be turned over to the trustee or the debtor, as the case may be, under 77B, and the court, under 77B, shall have the power to protect obligations incurred by the prior receiver or trustee who has had possession of part or all of the property of the debtor. The further provision is that the court under 77B, if the proceedings under 77B shall be dismissed, shall have the power to turn the property back to the prior receiver or trustee on such terms as may be just. In other words, the provisions of 77B take notice of the fact that a part or all of the property of a corporation (not the corporation) may be in the hands of a special receivership, and the point is that such a situation shall not preclude the possibility of proceedings under 77B. Proceedings under 77B may be had just the same, if the terms of subdivision (a) as to allegations of jurisdictional facts are complied with, but not otherwise. It is apparent that the language of subdivision (i) deals with special receiver-

ships for a part or all of the property of the corporation, and, by reference to subdivision (a), also deals with general equity receiverships. We submit that it is impossible to get any other meaning out of subdivision (i) which is reasonable and which can be said to be consistent with the other provisions of 77B; subdivision (i) being *administrative.*

If the construction for which we contend is given to subdivision (i) and to other subdivisions to which we have referred, then the whole of section 77B, so far as the meaning of "a prior equity receivership pending" is concerned, is harmonious.

We called attention to subdivision (i) as throwing a very important light upon the interpretation of "a prior proceeding in bankruptcy or equity receivership * * * pending" as found in subdivision (a). In order to get the full benefit of subdivision (i) in this behalf it is necessary to read substantially all of (i). That done, it is at once apparent that the provisions of subdivision (i) are *administrative* in their nature while the provisions in subdivision (a), to which we have referred, are *jurisdictional,* and subdivision (i) specifically provides that petitions or answers are to be filed under section 77B as provided in subdivision (a). When these two subdivisions are read together, it is apparent that the meaning of subdivision (i) is just what we have said it was.

If there is a prior proceeding in bankruptcy pending, that presupposes an act of bankruptcy of some kind, and it means that the corporation and all its assets are under the jurisdiction of the bankruptcy court where everybody in interest has a right to be heard and a right to assert his claim if he has any. There being a prior proceeding in bankruptcy pending, a petition or an answer may be filed under 77B as provided in subdivision (a). If there is no

prior proceeding in bankruptcy pending and there is a prior equity receivership pending, then a petition may be filed in accordance with the provisions of subdivision (a). The provision with reference to "a prior equity receivership pending" constitutes an enlargement of the acts of bankruptcy but only for purposes of 77B. The fifth act of bankruptcy, as found in section 3 of the act, reads in part as follows: "or while insolvent, a receiver or a trustee has been appointed, or put in charge of his property." That means a receiver in charge of all of the bankrupt's property, the bankrupt being insolvent, while the provision in subdivision (a) doesn't say anything about insolvency in connection with the appointment of a receiver. It is evident that the language in subdivision (a) and the language as to the fifth act of bankruptcy both refer to the same kind of receiver, the former being broader in a sense than the latter, and, as heretofore pointed out, the kind of receiver referred to in the fifth act of bankruptcy is not one appointed for a special purpose, but the receivership contemplated is of a general nature, and the law is settled on that point, according to the cases which we have cited.

On May 8, 1935, the United States district court for the southern district of New York, in the case of *In re 2168 Broadway Corporation, Alleged Debtor,* (C. C. H., par. 3448) decided this very point as to the meaning of a prior equity receivership pending, and we quote the opinion as follows:

> A receivership that is merely incidental to the foreclosure of a mortgage upon real estate of a corporate debtor that is unable to meet its debts as they mature, is not of the quality of the "equity receivership," which, under the provisions of subdivision (a) of section 77B of the bankruptcy statute, and in the absence of an act of bankruptcy, will confer upon creditors of such debtor a right to subject it and its property to the jurisdiction of this court. See *In the matter of Laclede Gas Light Company,* United States District

Court, Eastern District of Missouri, June 26, 1934; *Standard Accident Insurance Company* v. *E. T. Sheftall & Company*, 53 F. (2d) 40; and *Schmidtman* v. *Atlantic Phosphate & Oil Corporation*, 230 F. 769, 771.

In my opinion, the "equity receivership" contemplated by section 77B is of much wider scope than that which frequently accompanies foreclosure proceedings; for example, a general receivership, or one such as characterized the so-called "conservation suits," with which all of us are familiar. These suits usually resulted in the reorganization of a corporate debtor, or the pro rata distribution of its assets among its creditors. I am aware, of course, that the United States District Court for the Eastern District of Illinois in the matter of *Flamingo Hotel Company*, decided August 9, 1934, and in the case of *Surf Building Corporation*, decided October 13, 1934, entertains a contrary view. But, I cannot agree therewith. Adjudications dealing with section 3 (a) subdivision 5 of the bankruptcy act, and which long antedate the enactment of 77B, hold that an appointment of a receiver or trustee of the property of an alleged bankrupt, in order to constitute an act of bankruptcy, relates to such an appointment in the course of a general receivership, and not to one for specifically described property, and which occurs in the progress of the ordinary foreclosure action. I see no occasion to infer that congress, in enacting 77B, intended that a foreclosure receivership of a specific piece of real estate, even though it may constitute the debtor's only asset, should be comprehended by the words, "equity receivership" as they are used in the statute under consideration. Had the national legislature wished to include foreclosure receiverships within the descriptive words it saw fit to employ, I think the language would have been more explicit. In construing the words "equity receivership" as employed in 77B, it is necessary to take note of the fact that apparently they are used in apposition to the phrase "a prior proceeding in bankruptcy," which proceeding, of course, looks forward to the ratable distribution of a bankrupt's assets among its creditors. Such is not the necessary or usual objective of a foreclosure receivership. Its primary purpose is to protect a mortgagee whilst he completes the formalities of the foreclosure of his lien. The mortgagor's

unsecured creditors cannot participate either in the mortgaged security, or in its avails, until the lien holder is fully satisfied. Equity receiverships, on the other hand, as customarily administered in the federal courts, took on many of the habiliments of bankruptcy proceedings. Often they were a substitute, if not a subterfuge, for bankruptcies, and, in one form or another, finally wound up the affairs of the defendant corporation. Hence, I conclude that the foreclosure receivership on which petitioners rely, is not sufficient to enable the alleged debtor to be subjected to the provisions of 77B of the bankruptcy act, and the petition to that end will be dismissed.

With respect to petitioners' argument that the answer herein supplies any deficiency that may exist in the petition, it is necessary only to say that the attorney filing the answer has indicated his wish to withdraw the same, and further that it, too, is under attack by an alleged officer and director of the debtor. Under these circumstances, I think too much reliance should not be placed thereon.

The above decision was affirmed on July 15, 1935, by the Court of Appeals for the 2nd Circuit, in an opinion, (not yet officially reported to our knowledge), which opinion is set out in the Appendix hereto attached, together with the opinion of the Court of Appeals in the instant case and the opinion of the Court of Appeals for the Second Circuit in the case of *Broadway-Barclay Corporation*.

Under date of June 3, 1935, in the case of *In Re Draco Realty Corporation*, United States district court, southern district of New York, the question of a prior equity receivership pending was raised and passed upon favorably to the contentions which we here make (C. C. H. Para. 3492). The court had this to say:

Passing on to the consideration of the question whether a prior equity receivership proceeding is pending, notwithstanding the determination made in other districts in such cases as *In re Granada Hotel*, 9 Fed. 09 (see Para. 3416, 3488); *In re Surf Building Corp.* ee Para. 3076); *In re Flamingo Hotel* (see Para.

3007); and in this District, *In re Broadway-Barclay Corp.* (decided April 12, 1935, no opinion, Clerk's file No. 61329). I entertain an opinion *contra*.

The language of the Statute, "if a prior proceeding in bankruptcy or equity receivership," to my mind, contemplates something more than a receivership in an action to foreclose a mortgage upon a single or separate property of a debtor, who may have a diversity of assets and be willing to lose a property not regarded as a profitable investment where no deficiency judgment is entailed.

As Senior Judge Knox said, *In re 2168 Broadway Corp.* (See Para. 3448):

"In construing the words 'equity receivership' as employed in 77B, it is necessary to take note of the fact that apparently they are used in apposition to the phrase 'a prior proceeding in bankruptcy' which proceeding, of course, looks forward to the ratable distribution of a bankrupt's assets among its creditors. Such is not the necessary or usual objective of a foreclosure receivership."

In the instant case, if the property in question were sold under judgment of foreclosure, there would be no recovery against the Draco Realty Corp., which would still own the realty and chattels, unencumbered by said trust mortgage, not legally applicable to the claim of the petitioners, except in the event of the approval of this petition, which is not warranted upon the fact shown, and the petition is dismissed.

Under subdivision (5) of section (3) of the bankruptcy act, defining acts of bankruptcy, an act of bankruptcy is committed by the appointment of a receiver or trustee for an insolvent person (*Standard Accident Insurance Company* v. *Sheftall and Company*, 53 Fed. (2nd) 40), but that act of bankruptcy, like other acts of bankruptcy, as described in section (3), would have to occur within the four months period preceding the filing of the bankruptcy petition, while, under the provisions of 77B, it seems that the four months limitation, as to a prior equity receivership pending, is removed. We call attention to this distinction with the thought in mind that it may be helpful if any question in this behalf should be raised.

In this *Granada Hotel Corporation* case and also in the *Flamingo Hotel Company* case and in the *Surf Building Corporation* case, decided in the district court for the northern district of Illinois, the opinions were all by the same district judge and are all substantially the same insofar as they relate to the question of whether a foreclosure receivership is a prior equity receivership pending within the meaning of 77B.

Because of the *jurisdictional importance* of this question of a prior equity receivership pending, we have tried to cover it as thoroughly as possible, and we respectfully submit that certiorari should be granted and that this honorable court should settle this jurisdictional question.

Respectfully submitted,

GEORGE T. BUCKINGHAM,
DON KENNETH JONES,
VINCENT O'BRIEN,

APPENDIX.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

In the Matter of
Granada Hotel Corporation,
Debtor.

C. S. Tuttle, Albert J. Peterson, Lewis W. Riddle, W. G. Sturm, and E. A. Kilmer, as Members of a Committee constituted under the terms of the Deposit Agreement dated April 28, 1933, etc.,
Appellants.

vs.

Sam Harris, J. Rose and I. Gordon,
Petitioning Creditors.
Appellees.

Appeal from the District Court of the United States for the Eastern District of Illinois.
Honorable
Walter C. Lindley,
Judge.

Per Curiam:

Concededly there is but one question in this case, and that is whether or not at the time of the filing of the petition under Section 77B of the Bankruptcy Act there was a prior proceeding in equity receivership pending. The record shows, that prior to the filing of this petition, a bill to foreclose had been filed in the State Court by a second mortgagee under which a receiver had been appointed. While that case was pending, the trustee named in the first mortgage appeared in the State Court, and asked that Court to enter an order directing its receiver to report to the trustee, and turn over to it the possession of the mortgaged property. The State Court entered the order, but the foreclosure cases was still pending before the Master at the time of the filing of the petition herein, and jurisdiction over the property and the trustee remained with that Court. This showing was sufficient to sustain the jurisdiction of the Bankruptcy Court under Section 77B, Clark on Receivers, Secs. 12, 13, 14, and 963, and the District Court so held.

The order of the District Court sustaining the petition is therefore affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Second Circuit.

In the Matter of
2168 Broadway Corporation,
Alleged Debtor,
Duparquet, Huot & Moneuse Co., E. E. Alley Co., Inc., and H. B. Day Co., Inc.,
Appellants.

Before: MANTON, SWAN and AUGUSTUS N. HAND, *Circuit Judges.*

Appeal from the District Court of the United States for the Southern District of New York.

Three creditors of 2168 Broadway Corporation filed a petition under 77B of the Bankruptcy Act (11 U. S. C. A. sec. 207) alleging that receivers had been appointed in a mortgage foreclosure action brought against the said corporation. From an order granting the motion of other creditors to dismiss the petition as insufficient on its face, the petitioners have appealed. Order affirmed.

Harper & Matthews, Attorneys for Appellant; Mark M. Horblit and Harold Harper, of Counsel.

Daniel A. Shirk and Milton A. Goldiner, Attorneys for Appelees; Edwin R. Wolf and Daniel A. Shirk, of Counsel.

SWAN, *Circuit Judge:*

It is provided by section 77B (a) that three or more creditors who have provable claims against a corporation aggregating $1,000 or more in excess of the value of securities, may file "a petition stating that such corporation is insolvent or unable to meet its debts as they mature, and if a prior proceeding in bankruptcy or equity receivership is not pending, that it has committed an act of bankruptcy within four months," and that such creditors propose that it shall effect a reorganization. Subdivision (i) further provides:

"If a receiver or trustee of all or any part of the

property of a corporation has been appointed by a Federal, State or Territorial court * * * a petition or answer may be filed under this section at any time thereafter by the corporation, or its creditors as provided in subdivision (a) of this section * * *"

The appellants are three creditors of 2168 Broadway Corporation, a New York corporation which holds the title to premises known as 2166-2168 Broadway. They filed a petition for the reorganization of their debtor, alleging that receivers had been appointed in an action commenced in the state court to foreclose a mortgage upon the debtor's property and that such receivers were in possession of its only property and administering the income therefrom for the benefit of the plaintiff in said action. Upon motion of other creditors of the debtor corporation the district court dismissed the petition on the ground that a mortgage foreclosure suit in which receivers have been appointed, is not an "equity receivership" within the meaning of section 77B. The correctness of this construction is the sole question presented.

Because the statute is of so recent enactment there has been as yet but little expression of judicial opinion on this important question. In three cases arising in the eastern district of Illinois, Judge Lindley held a mortgage foreclosure suit in which receivers were appointed to be an "equity receivership" for the purposes of section 77B. *In re Flamingo Hotel Co.* (August 9, 1934, not officially reported); *In re Surf Building Corp.* (October 17, 1934, not officially reported; *In re Granada Hotel Corp.*, 9 F. Supp. 909. The case last cited has been affirmed by the Circuit Court of Appeals for the Seventh Circuit in a short *per curiam* opinion, handed down June 5, 1935, which has not yet appeared in the reports. Opposed to these decisions is the opinion of Judge Knox in the case at bar, a decision by Judge Hulbert in *In re Draco Realty Corp.* (S. D. N. Y., June 3, 1935, not officially reported), and a dictum by Judge Faris in *In re Laclede Gas Light Co.* (E. D. Mo., June 26, 1934, not officially reported). See also 48 Harv. L. Rev. 39, 54, note 57.

The appellants argue that the words "equity receivership" are too clear to admit of construction and that custody of the property of a corporation by a receiver appointed in the exercise of chancery powers in any suit in equity must necessarily satisfy the requirements of the

statute. It cannot be gainsaid that an action to foreclose a mortgage is a suit in equity, or that the receiver appointed in such a suit to conserve the mortgaged property and collect the rents pending foreclosure may properly be called a receiver in equity. See Carmody's N. Y. Practice (2nd ed.), Vol. 8, sec. 1023; *Gordon* v. *Washington,* 294 U. S. ..... (Apr. 1, 1935). Nevertheless, it by no means follows that that is the type of suit Congress had in mind when it used the words in question. It would be strange indeed to call such a suit an "equity receivership"; so far as we are aware, a foreclosure action is never so referred to. The kind of suit to which those words are usually applied in common parlance is one commenced by a simple contract creditor praying for the conservation of the assets of a corporation insolvent in the common law sense, in which the corporation confesses the allegations of the bill and consents to the appointment of a receiver. The end sought by such a suit is the liquidation of the assets and their equitable distribution among creditors (*Gordon* v. *Washington, supra*) although in rare instances successful administration in receivership may restore to the corporation the ability to meet its debts in due course and the right to repossess its assets. The hope of saving the business is the impelling motive for such an equity receivership, as is indicated by the name "conservation suit," by which it is sometimes called. In our opinion it was a receivership of this general type, initiated by suit by a general credtor or a stockholder of the corporation, which Congress had in mind. Compare *Bryan V. Welch,* 74 F. (2d) 964 (C. C. A. 10). We do not think it was intended that the appointment of a receiver in foreclosure who takes possession of a specific piece of property for the sole benefit of the lien holder should serve as the basis of involuntary reorganization proceeds.

It is urged that this kind of equity receivership originated in the eastern part of the country and has not been used generally throughout the nation, except as to railroad corporations; that to construe the words as we have indicated is to ascribe to them a colloquial meaning contrary to well recognized canons of statutory construction. But the debates in Congress during the progress of the bill, although not affording any conclusive evidence of the meaning of the words in question, indicate the legislators were thoroughly familiar with this type of receivership.

See 78 Cong. Rec. 7590, 7905-7. Moreover, the words are used in apposition to "a prior proceeding in bankruptcy." If either a proceeding in bankruptcy or an equity receivership is pending, it is unnecessary to allege that the corporation has committed an act of bankruptcy within four months. The appointment of a receiver in foreclosure proceedings is not an act of bankruptcy. See *Standard Accident Ins. Co.* v. *E. T. Sheftall & Co.*, 53 F. (2d) 40, 41 (C. C. A. 4). The canon of *ejusdem generis* is applicable. Bankruptcy looks to a liquidation of assets and an equitable distribution among creditors. So also does an equity receivership in a "conservation suit." When Congress enacted 77B, a distressingly large number of corporations had already been, or were in danger of being, placed in bankruptcy or equity receivership of the type described. It was seen that immediate liquidation of the assets would result in economic waste and unnecessary loss to creditors and stockholders. The purpose of the legislation was to supersede proceedings looking to liquidation by proceedings, looking to reorganization if there was an honest prospect that a plan fair to all interests could be devised to save the business. The benefits of the plan could be sought voluntarily by the debtor corporation, or they could be obtained upon an involuntary petition filed by creditors under the conditions specified. Reading the language in the setting in which it is used and in the light of the purpose of the legislation, we cannot think that Congress intended to give three creditors having claims totaling as little as $1000, the right to force a corporation into a reorganization, if a receiver were appointed in the foreclosure of a mortgage covering any of its property. Situations may well be imagined in which a corporation might allow a mortgage on part of its land or on a chattel to be foreclosed, with the appointment of a receiver pending foreclosure, without being in any need of a reorganization. We do not believe that it was the purpose of Congress to permit every foreclosure proceeding in which a receiver might be appointed to be superseded by an involuntary reorganization. In the case at bar the mortgage covered all the debtor's property but the logic of the appellants' position, as they concede, compels them to argue for the same result however small a portion of the debtor's property may be involved in foreclosure. Subdivision (i), it is true, refers to the appointment of a receiver of all or any part of the property of a corporation. This, we think, contemplates a

situation where the corporation may have property outside the jurisdiction of the appointing court, in which case only part of its property could be in equity receivership without ancillary proceedings. In our opinion the district court correctly construed the statutes. Accordingly the order is affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Second Circuit.

In the Mater of
The Petition of Robin P. Allen, Francis M. Allen and Genevieve D. Allen,
Petitioners-Appellees.
For the Reorganization of
Broadway-Barclay Corporation,
Debtor-Appellant.

Before: MANTON, SWAN and AUGUSTUS N. HAND, *Circuit Judges.*

Appeal from the District Court of the United States for the Southern District of New York.

This is an appeal by Broadway-Barclay Corporation, debtor, from orders approving the petition of three creditors for reorganization of the debtor under section 77B of the Bankruptcy Act (11 U. S. C. A. sec. 207) and denying the debtor's motion to dismiss said petition. Orders reversed.

Glass & Lynch, Solicitors for Appellant; Joseph Glass and Leslie Kirsch, of Counsel.

Brown & Falkinburg, Solicitors for Appellees; James F. Donnelly and Samuel Michelman, of Counsel.

Samuel L. Chess, Solicitor for Minority Group of Bondholders.

Miller, Boston & Owen, Solicitors for Independent Bondholders' Committee; J. F. Gillis, Counsel.

SWAN, *Circuit Judge:*

Broadway-Barclay Corporation, hereafter called the debtor, is the owner of a large office and bank building lo-

cated in New York City. This property is subject to a mortgage securing $6,383,500 of bonds upon which the debtor became in default. In October, 1932, the trustee under the mortgage took possession of the building by agreement with the debtor and has ever since collected the rents thereof pursuant to said agreement. In March, 1934, the trustee began a foreclosure action in the state court. On January 3, 1935, three creditors of the debtor, each owning one of the debtor's $1,000 mortgage bonds, filed an involuntary petition for reorganization of the debtor under section 77B. They alleged no act of bankruptcy but rely upon the pendency of the foreclosure action, although no receiver has ever been appointed in said action and the mortgage trustee is in possession under the aforementioned agreement and without a court order. Without opinion the district court entered the orders appealed from.

This appeal raises a question similar to that decided in *In re 2168 Broadway Corporation,* handed down herewith, in which we have held that the appointment of a receiver in an action to foreclose a mortgage on the debtor's only property is not an "equity receivership" for the purpose of section 77B. That decision necessarily controls this. We may add, however, that even had a different conclusion been reached in that case, the orders in the case at bar would have to be reversed. We think it entirely clear that section 77B contemplates by a prior equity receivership a suit in which a receiver has already been appointed and not merely the commencement of a suit in which a receiver may be appointed. The well reasoned opinion of Judge Faris in *In re Laclede Gas Light Co.* (S. D. Mo., June 26, 1934, not officially reported) is in point. See also *In re Associated Gas & Electric Co.* (S. D. N. Y., Oct. 26, 1934, not officially reported). The orders are reversed with directions to dismiss the petition.